No. 94-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ASTON A. BEADLE,

Petitioner,

v.

CITY OF TAMPA, FLORIDA, a Florida municipal corporation, and THE CITY OF TAMPA, FLORIDA, POLICE DEPARTMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND MEMORANDUM OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AND THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AMERICAN SECTION) AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, the National Jewish Commission on Law and Public Affairs ("COLPA") and the International Association of Jewish Lawyers and Jurists (American Section) ("IAJLJ") hereby

move for leave to file the attached Memorandum in support of Petitioner.

Petitioner has consented to the filing of this Memorandum. Respondents' counsel have stated that they "neither agree nor object to" the filing of this Memorandum.

Since the *amici* have previously filed briefs in this Court on religious liberty issues and wish to bring the considerations in this Memorandum to the attention of the Court, they hereby request leave to file.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

In two companion cases involving the same petitioner, the Court of Appeals for the Eleventh Circuit has effectively excluded Sabbath-observing individuals from service as local government law-enforcement officials with

no substantial evidence that accommodation to the religious convictions of such prospective employees would create an undue hardship. The *amici* are Jewish organizations committed to the protection of rights to observe the Jewish faith in the United States and throughout the world. Although the Eleventh Circuit's decisions involve a member of the Seventh-Day Adventist Church, the principles stated by the court would apply to Orthodox Jews, to Sunday-observing Christians, and to observant Muslims. We urge this Court to correct the Eleventh Circuit's misapplication of the Civil Rights Act and thereby prevent the unwarranted exclusion of Sabbath-observers from government jobs which they are fully able to carry out.

Observance of the Sabbath is a central principle of the Jewish faith and has been a unifying force throughout 35 centuries of the existence of the Jewish people. Unreasoned discrimination in employment against Sabbath-observers by government agencies is contrary to the principles of freedom enshrined in the First and Fourteenth Amendments.

The National Jewish Commission on Law and Public Affairs ("COLPA") is a non-profit association of volunteer attorneys and social scientists who donate their services for public advocacy on behalf of the Orthodox Jewish community. COLPA has filed briefs on the merits in most of the important religious liberty cases considered by the Court over the past twenty years. *See, e.g., Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Cmte. for Public Educ. v. Nyquist*, 413 U.S. 756 (1973); *TWA v. Hardison*, 432 U.S. 63 (1977); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Mueller v. Allen*, 463 U.S. 388 (1983); *Corp. of Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos*,

483 U.S. 327 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 (1993); *Board of Education of the Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481 (1994).

The national Orthodox Jewish organizations joining this brief through COLPA are:

Agudath Harabonim of the United States and Canada
Amit Women
Emunah of America
National Council of Young Israel
Poalei Agudath Israel
Rabbinical Alliance of America
Rabbinical Council of America
Torah Umesorah (The National Society for Hebrew Day Schools)
Union of Orthodox Jewish Congregations of America ("Orthodox Union")

The International Association of Jewish Lawyers and Jurists (American Section) ("IAJLJ") is a membership organization consisting of attorneys and judges in more than 32 countries around the world. Its founder was retired Justice Haim Cohn of the Supreme Court of Israel, and its Honorary President, until his death, was former Justice Arthur J. Goldberg. The American Section was organized in 1983 by members of the American Jewish legal community to defend Jewish interests and human rights in the United States and abroad. Among the IAJLJ's concerns has been the protection of the right to observe one's religion, and particularly the protection of Jewish religious rights around the world.

ARGUMENT

Notwithstanding the statutory requirement of Section 701(j) of the Civil Rights Act of 1964, as amended, the Eleventh Circuit has held in this case that a police department need not make any change whatever in its "neutral rotating shift system" for an employee who has religious convictions that prevent him or her from working from sundown Friday to sundown Saturday. The court below said that since "the employer's business involves the protection of lives and property" (Pet. App. 10a) and it is required to allocate work schedules "among over nine hundred employees" (Pet. App. 9a), any departure from its system of random assignments would be more than the *de minimis* accommodation prescribed by *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). The Eleventh Circuit rejected the position presented by the Equal Employment Opportunity Commission, which filed an *amicus curiae* brief in support of the petitioner.

The Eleventh Circuit's conclusion conflicts with the governing statute, with this Court's decisions applying that statute, and with decisions of other federal appellate courts. It also conflicts with the approach approved by a majority of this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), whereby religious minorities, such as the Seventh-Day Adventist Church to which the petitioner belongs, may be accommodated by *legislative* protections encompassed in duly enacted statutes even if the Free Exercise Clause does not, of its own force, protect them. This Court said in *Smith*, "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." 494 U.S. at 890. The decision below makes this an empty "expectation" by reading a statute designed to protect religious practices as providing virtually no protection.

I

THE DECISION BELOW ERADICATES THE STATUTORY OBLIGATION OF EVERY EMPLOYER TO MAKE *SOME* EFFORT AT "REASONABLE ACCOMMODATION"

In *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986), this Court construed Section 701(j) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(j). While the Court majority held that the statute did not require an employer "to choose any particular reasonable accommodation" (479 U.S. at 68), there was no doubt expressed in the Court's opinion that the statute set out an "accommodation obligation." 479 U.S. at 69.

The Eleventh Circuit's decision approves a course of conduct in which *no* effort whatever at accommodation was made by the defendant. That is contrary to the language of the statute and to the many cases cited in the petition for certiorari in which federal courts of appeals have required some effort at accommodation.

In fact, possible accommodation in this case was far easier than might appear at first blush. During the "field training assignment" period for Tampa police officers, trainees were expected to work for four ten-hour days. Nonetheless, the Tampa Police Department did not assign petitioner to a field training group that worked Sunday through Wednesday, with Thursday, Friday and Saturday off. With full knowledge of his religious convictions, the Tampa Police Department assigned petitioner to a Friday-through-Monday shift. This plainly conflicted with his religious obligation to refrain from work between sundown Friday and sundown Saturday. It amounted to a disqualification of any Seventh-Day Adventist or any

Orthodox Jew — or, indeed, any Sunday-observing Christian — from the Tampa Police Department.

This Court should review this case to overcome the crippling effect that this decision and its companion, *Beadle v. Hillsborough Court Sheriff's Office*, 29 F.3d 589 (11th Cir. 1994), pending as No. 94-1610, have on religious observers seeking employment within the States covered by the Eleventh Circuit. Employers in those jurisdictions who have reason to maintain some work-force around-the-clock seven days a week will henceforth believe that they may refuse to hire religious observers, no matter how easily they can be accommodated.

II

THE DECISION BELOW UNDERMINES LEGISLATIVE PROTECTION FOR RELIGIOUS MINORITIES IN DEROGATION OF *EMPLOYMENT DIVISION v. SMITH*

If not for *Employment Division v. Smith*, 494 U.S. 872 (1990), petitioner could have brought a constitutional claim under the First and Fourteenth Amendments against governmental employers who were refusing to hire him or were forcing him to resign because his religious convictions would not be accommodated in his governmental employment. It would then have been the defendants' burden to establish that there was a compelling governmental interest that justified denying employment on the Tampa

Police Department to the petitioner — even in jobs that did not require Saturday work. *

In deciding *Employment Division v. Smith, supra*, this Court held that the Free Exercise Clause gave petitioner no right to demand accommodation or, in the absence of any accommodation, a showing of a "compelling governmental interest." Instead, the Court majority has remitted religious observers like petitioner to legislative accommodation.

Section 701(j) is precisely such a form of legislative accommodation. If it is to have any meaning in the context of local government employment, it cannot be limited, as the Eleventh Circuit has limited it, to government employers that do not have large employment rolls, are not involved in the "protection of lives and property," and do not maintain a work force around-the-clock. If these are to be exemptions from the statutory requirement of "reasonable accommodation" and "undue hardship," the Congress should write them into the statute.

In view of the participation of the Equal Employment Opportunity Commission as *amicus curiae* in support of petitioner in the Eleventh Circuit, this Court should, at the very least, request the Solicitor General to state the views of the United States with regard to this petition.

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* It was undisputed that weekend work was not required of the officers who were in the "downtown squad." See Pet. App. 4a. Another possible accommodation was to hire petitioner as a background investigator. Pet. 7.

CONCLUSION

For the foregoing reasons, the Court should grant writs of certiorari in both No. 94-1610 and in 94-1705 and consolidate the cases for argument.

Respectfully submitted,

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